82-1815

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH EKEN AND WILLIAM JOHNSON,
As Representatives of the Class of Investors Defrauded by Trenton H. Parker and International Mining Exchange, Inc.,

Petitioners,

vs.

INTERNATIONAL MINING EXCHANGE, INC., TRENTON H. PARKER, et al.

UNITED STATES

vs.

TRENTON H. PARKER and INTERNATIONAL MINING EXCHANGE, INC.

ELIZABETH EKEN and WILLIAM JOHNSON, As Representatives of the Class of Investors Defrauded by Trenton H. Parker and International Mining Exchange, Inc.,

Petitioners.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED FOR REVIEW

Does a United States District Court have jurisdiction in a criminal case to create a receivership?

Does a United States District Court hearing a criminal case have jurisdiction, through the creation of a receivership, to supersede a civil action pending before another Federal District Court?

Where in excess of ten million dollars was defrauded from escrowed monies from more than a thousand investors in a nationwide securities fraud, is it an abuse of discretion for a United States District Court hearing a criminal case arising from the fraud to create a receivership directed to manage and disburse a partial recovery, thereby superseding a class action filed on behalf of the investors pending in a separate Federal Court?

May a United States District Court hearing a criminal action and considering the creation of a receivership hold an untranscribed hearing in chambers and exclude from that hearing counsel representing the class of individuals claiming the funds to be placed in the receivership?

Where a class action has been certified pursuant to *Rule* 23(b)(1) of the Federal Rules of Civil Procedure, and where there has been a holding that funds recovered are a constructive trust for the benefit of all investors defrauded through a nationwide securities fraud, may a limited group of investors be allowed to collect disproportionate punitive damages from a limited recovery to the detriment of the class?

PARTIES PARTICIPATING BEFORE THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Participating in this case before the United States Court of Appeals for the Tenth Circuit were Elizabeth Eken and William Johnson, as representatives of the class of investors defrauded by Trenton H. Parker and International Mining Exchange, Inc., R.F.B. Petroleum, Inc. (a Texas Corporation), Robert F. Brown, Robert A. Brandt, Robert C. Herzfeld, William C. Lam and the United States Attorney for the District of Colorado. Not participating were defendants in the civil actions who are listed in the footnote below.[1]

Robert C. Herzfeld has filed a petition for certiorari which has been docketed before this Court as No. 82-1731. Robert F. Brown and R.F.B. Petroleum, Inc. have filed a petition for certiorari which has been docketed before the Court as No. 82-1732.

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1. International Mining Exchange, Inc., Trenton H. Parker, R. Stephen Spangler, James T. Wilson, Adrian Doyle, Robert Norwood, Dwain Sarby, Al Jordan, Seymour Feder, Federated Securities, Inc., Wellington International Bank & Trust Ltd., American Hill Placer, Ltd., United Swiss Commonwealth Bank & Trust Group, Ltd., Seagull Creek Silver, Ltd., Arum and Argentum, Ltd., Deutsche Kroenll Mineralisch Anstalt, Compagnie Miniere Paul Isnard International, Larry Hercules, Paul Isnard, Jerome Schneider, W.F.I. Corporation, Jeff Parker a/k/a Jeff Merck.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ELIZABETH EKEN AND WILLIAM JOHNSON,
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OPINIONS AND ORDERS BELOW

The Court in 82-CR-122 (D. Colo.) issued no opinion. It did, however, issue an Order creating a receivership. That Order appears in Appendix A. There exists no transcript of the in-chambers hearing resulting in the creation of the receivership.

The Court in 81-3990 (D.N.J.) issued several Orders pertinent to this petition, including an amended Order granting class certification, an Order granting judgment, and an Order holding that funds recovered from Trenton H. Parker are a constructive trust for the benefit of all investors defrauded by Parker and the International Mining Exchange, Inc., They are included in Appendix B, C and D, respectively. Additionally, excerpts from transcripts of comments made by the Court rendered on April 16, 1982 and June 11, 1982 are included in Appendix E and F, respectively.

The opinion of the Court in 82-J-17, 80-K-850 and 80-K-859 is included in Appendix G.

The decision of the United States Court of Appeals for the Tenth Circuit, dated January 31, 1983, is included in Appendix H. On March 7, 1983, the United States Court of Appeals denied a petition for rehearing. Appendix I. However, on March 28, 1983, the United States Court of Appeals granted petitioners' request for Stay of Mandate. Appendix J.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was issued on January 31, 1983. A timely petition for rehearing with suggestion that the rehearing be *en banc* was denied on March 7, 1983, and

this petition for certiorari is being filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

Rule 57(b) of the Federal Rules of Criminal Procedure states:

> If no procedure is specifically described by a rule, the Court may proceed in any lawful manner not inconsistent with these rules or with applicable statute.

Public Law 92-291, 18 U.S.C. §3579, §5(a) (4) (d) states in pertinent part:

> The Court shall impose an Order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process.

18 U.S.C. §3651 provides in pertinent part that:

> While on probation and among the conditions thereof, the defendant may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; . . .

The fifth amendment to the United States Constitution provides, in pertinent part, that "No person shall . . . be deprived of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

This petition for certiorari arises from five separate actions initially before three Federal District Court Judges. These actions include *Elizabeth Eken, et al. v. International Mining Exchange, Inc., Trenton H. Parker, et al.* (a class action filed under the authority of 15 U.S.C. 77(v) on behalf of all individuals defrauded in a massive securities swindle and docketed in the United States District Court for the District of New Jersey, Civil Action No. 81-3990); *Elizabeth Eken, et al. v. International Mining Exchange, Inc., Trenton H. Parker, et al.* (the judgment and class certification arising from the New Jersey class action and docketed in Colorado under No. 82-J-17); *United States v. Trenton H. Parker, International Mining Exchange, Inc.*, (a criminal prosecution brought in Colorado and arising out of the same securities fraud which was the subject of the class action, Docket No. 81-CR-122); *Robert F. Brown, et al. v. Trenton H. Parker, et al.* and *Robert Herzfeld v. Trenton H. Parker, et al.* (consolidated civil actions filed in the United States District Court for the District of Colorado by individual plaintiffs against the main actors in the securities fraud noted above, under the respective docket numbers of 80-K-850 and 80-K-859).

In the fall of 1979, Trenton H. Parker, International Mining Exchange, Inc. and others began marketing a "Gold Tax Shelter Investment Program." The details of the program are not pertinent to this petition except to note that as part of a nationwide securities fraud well over 1,000 investors (most of whom were then unidentified) had been bilked of well in excess of $10.5 million in funds which were to have been held in escrow by the defendants.[2] The perpetrators of the fraud had

2. Some of the details of the scheme may be found in *S.E.C. v. International Mining Exchange, Inc.*, 515 F. Supp. 1062 (D. Colo. 1981). That proceeding terminated in 1981.

effectively hidden the funds stolen from investors in foreign bank accounts under the names of shell corporations.

The activities of the defendants spawned several actions in the Federal Courts. These petitioners brought a class action under the authority of 15 U.S.C. 77(v) (Securities Fraud) in the District of New Jersey. The class action was certified under *Rule* 23(b)(1) of the Federal Rules of Civil Procedure. Prior to the filing of the class action, the main actors in the fraud scheme had been indicted (but not tried) in the District of Colorado based upon allegations that they had violated federal law. Two damage actions by individual investors had also been filed.

In January of 1982, counsel for the class gained information leading to the conclusion that substantial funds remained in the Grand Cayman Branch of Barclays Bank International, Ltd. under the names of shell corporations controlled by the defendants. Upon application of the named plaintiffs in the class action, the United States District Court for the District of New Jersey issued an Order freezing[3] the stolen funds for the benefit of the class of investors defrauded. (App. 13, 21)

Trenton H. Parker, the principal creator of the fraud scheme, has admitted that he learned that his access to funds held at Barclays was blocked shortly after his criminal trial began. He thereupon entered into plea negotiations with the United States Attorney's Office. Parker attributes the recommendation that he change his plea to guilty in the pending criminal matter to the knowledge that access to stolen funds had been blocked.[4]

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3. Barclays Bank International, Ltd. is a unitary international corporation doing business in the District of New Jersey.

4. Trenton H. Parker made this admission just days before the initial decision was rendered by the United States Court of Appeals

As part of the plea negotiations, the return to the United States of all funds stolen from investors was demanded, and Parker ostensibly agreed. At the same time, Parker informed the United States Attorney's Office, through his counsel, that there was an individual in the employ of Barclays Bank in Grand Cayman (where the funds in question still remained) who might interfere with their return.

Counsel for the class was contacted by one of the Assistant United States Attorneys during the plea negotiations and participated in conference discussions with the legal representatives of Barclays to structure speedy return of the funds to the United States. As a result of the potential for interference with return of the funds, it was agreed that speed in getting the funds in the United States was essential. It was concluded that the most expeditious method of return was via the Office of the United States Attorney.

One of the Assistant United States Attorneys responsible for prosecuting Parker requested that the above information be transmitted to the United States District Court for the District of New Jersey with a request that transfer be permitted. In fact, this request was transmitted and honored; on February 9, 1982, the Honorable Herbert J. Stern executed an Order permitting transfer of funds to the United States District Court for the District of Colorado. Judge Stern has indicated that his intent in executing the modification was to allow transfer "for safekeeping". At no time prior to the execution of Judge Stern's Order did the Office of the United States Attorney indicate that a receivership separate and apart from the class action was contemplated. (App. 22) Un-

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on January 31, 1983. A transcript of Parker's comments was made available to the Court, however, for consideration in connection with petitioners' motion for rehearing.

known to counsel in the civil cases, however, when the possible plea was discussed with the Court, the attorneys for the defendants requested that the criminal court stay all civil actions then pending.[5]

On February 9, 1982, counsel for the class was present in court when Trenton H. Parker and International Mining Exchange, Inc. pled guilty before the Honorable Fred Winner. After the plea proceedings, counsel for the class was informed by the Assistant United States Attorney responsible for this prosecution that a hearing would be held that afternoon to discuss what would be done with the funds involved when recovered. The Assistant United States Attorney indicated that he would have no objection to participation by counsel for the class. Participation, however, was not permitted by the Colorado District Court. The hearing was held in chambers and counsel for the class was not even permitted to attend, despite requests to do so. There is no transcript of this hearing. Subsequently, counsel for the class learned that a Mr. William Lam was appointed as receiver in the criminal action to administer the funds recovered from Barclays Bank, totalling approximately $5.6 million. His mandate from the criminal court was to identify investors, discover the amount defrauded, and, pursuant to the Orders of the Criminal Court, issue partial reimbursement of the funds defrauded. The Criminal Court later announced its intention to hold a series of "entitlement hearings" among the defrauded investors. The Criminal Court indicated that some of the hearings may take as long as "20 weeks," with some taking only "20 minutes."

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5. This occurred at an untranscribed hearing held in chambers. Though untranscribed, Court was in session and the Court Clerk took notes which are part of the record in this case. An extract from those notes is reproduced in Appendix K. App. 50.

The United States District Court for the District of New Jersey made a formal request to the Criminal Court that custody of the funds be transferred to the United States District Court for the District of New Jersey so that the recovery could be administered through the pending class action. App. 9. This request was never formally ruled upon by the Criminal Court which, however, continued its plans to have its receiver locate investors, determine the amounts defrauded, and distribute funds.

After a formal motion was made to transfer the defrauded investors'[6] funds recovered from Barclays to the control of the New Jersey District Court, an attempt was made by certain individual civil litigants to garnish on the recovery based upon previously obtained judgments heavily laden with punitive damages.

A motion to order transfer of the funds under the control of the Criminal Court of New Jersey, along with a motion to dismiss the garnishments came before a Federal District Court Judge other than the one hearing the criminal case. That judge, in an Opinion dated July 26, 1982, stated that he could find no authority permitting a federal court hearing a criminal matter to create a receivership. However, the judge also ruled that he had no jurisdiction to review the Orders of a judge of equal jurisdiction. The Court therefore denied the motion to transfer funds to New Jersey, but concluded that, "Such serious questions regarding the orderly administration of justice exist that I will make findings which will permit an immediate appeal from this Order in accordance with

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6. The funds recovered were diverted trust funds to have been held by International Mining Exchange, Inc. in escrow for the benefit of defrauded investors. All funds recovered have been held to be the funds of investors, not the assets of either Trenton H. Parker or International Mining Exchange, Inc. See Appendix D. App. 7.

28 U.S.C. §1292(b)." App. 31. At the same time the class representatives took a direct appeal from an Order issued by the Criminal Court paying counsel fees for the receiver[7] and appealed from the Criminal Court's failure to transfer funds. These appeals were taken pursuant to 28 U.S.C. §1292(a) (2).

The United States Court of Appeals for the Tenth Circuit granted leave to appeal on August 23, 1982, and consolidated all of the then pending appeals. It heard the case on an accelerated schedule and on January 31, 1983, issued a decision holding that the creation of a receivership by a Criminal Court was valid, affirmed the lower Court's Order quashing garnishments, and denied the motion to transfer funds in the Colorado receivership to the control of the United States District Court for the District of New Jersey. An application for rehearing was denied on March 7, 1983. On March 28, 1983, the Court stayed mandate pending filing and disposition of petitioners'[8] writs for certiorari.

During the pendency of the proceedings, Trenton H. Parker moved to retract his plea and applied for a new trial. That motion has not yet been ruled upon by the Criminal Court. Also, during the pendency of the appeal, the New Jersey class action has proceeded, thus far locating approximately 1,200 investors representing some $10.6 million in funds defrauded by defendants. Further, an additional $400,000 was recovered from for-

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7. Some $73,000 in fees to the receiver and his counsel have been paid or approved for payment to date. The amount paid in expenses is unknown.

8. The Order provides that provided that petitions for a writ of certiorari were filed by April 27, 1983, the stay would remain in effect. While this petition was filed subsequent to April 27, 1982 (though still within time) two other petitions were filed prior. Thus, the stay remains in effect.

eign bank accounts and remain under the control of the United States District Court for the District of New Jersey for distribution pursuant to the class action.[9]

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9. These facts were before the Tenth Circuit through a motion to supplement the record.

REASONS WHY THIS PETITION SHOULD BE GRANTED

A. The ruling below of the United States Court of Appeals for the Tenth Circuit raises for the first time important jurisdictional questions heavily impacting upon the orderly administration of justice in the Federal Courts.

The importance of the issues involved in this case has not been lost upon the Courts below. One District Court, in its opinion and on its own motion, found that "such serious questions regarding the orderly administration of justice exist (by virtue of the creation by a criminal court of a receivership) that I will make findings which will permit an immediate appeal in accordance with 28 U.S.C. §1292(b)." The United States Court of Appeals for the Tenth Circuit not only expedited the appeal, but stayed mandate to permit review by this Court prior to further action at the District Court level.

The importance of this case lies in the fact that by virtue of the Tenth Circuit's Opinion the balance of responsibilities between the federal civil and criminal courts has been dramatically altered. Indeed, the practical effect of the Circuit's ruling is to permit a criminal court to supersede a civil court by invoking its power to order restitution and overseeing that restitution itself through the appointment of a receiver. As has happened in this case, such a procedure will cause serious conflict between the civil and criminal courts.

The holding of the United States Court of Appeals for the Tenth Circuit is, as the opinion itself noted, entirely without precedent. While, as the Circuit pointed out, receiverships have been utilized to effectuate restitution in criminal cases, those receiverships emanated from civil actions. Opinion at 10, citing *United States v. Roberts*, 619 F.2d 1 (7th Cir. 1979); *United*

States v. Boswell, 605 F.2d 171 (5th Cir. 1979); *Paterson v. Stovall*, 528 F.2d 108 (7th Cir. 1976). Thus, always before where a civil action existed at the time a restitutionary order was entered the process of restitution was left to the civil courts.

As the United States District Court for the District of New Jersey has noted, the action of the criminal court is "tantamount to initiating a new class action." (App. 14) Yet a class action already exists and has already made significant progress toward identifying the more than 1,000 investors nationwide and verifying their investments. Additional recoveries of funds have been made through the class action and are in the control of the United States District Court for the District of New Jersey. Further, though the total recovery is large in the abstract it is but a portion of the total sum already identified as being defrauded from investors and continuing civil litigation must ensue to make defrauded investors whole.

This has led to conflict between the civil court and the criminal court. The civil litigants have consistently opposed, for instance, the cost and duplication which a separate receivership arising from the criminal court will necessarily entail. The criminal court has announced an intention to "ignore" the proceedings in the civil court and hold in the criminal case a series of "entitlement hearings" to determine what sum individual investors should receive. These entitlement hearings are expected to be extensive, ranging to 20 weeks in length for each investment group. The civil court has noted that the actions of the criminal court are making an already complex piece of litigation more complex and, indeed, potentially unmanageable. The decision to ignore the class action will inevitably cause a duplication of proofs with regard to distribution of monies recovered (for separate funds exist in the control of both the civil court and the

criminal court) and destroys traditional concepts of collateral estoppel and *res judicata*. Also, given the number of investors, conflicting rulings concerning entitlements are highly likely while some of these conflicts have already manifested themselves in the instant action, they are inherent in the novel approach sanctioned by the Tenth Circuit. The direction of this Court is urgently needed so that conflicts between the criminal and civil courts can be avoided, both in this case and future cases.

Further, the action of the Tenth Circuit creates a new exception to traditional concepts of comity and would appear to conflict by implication with the holding of this Court in *Princess Lida v. Thompson*, 305 U.S. 456, 59 S. Ct. 275, 83 L.Ed. 285 (1930). In *Princess Lida* this Court set forth the general rule that where two courts seek to control property, it is the first court asserting control over the property which should continue jurisdiction. This Court made it clear that physical possession of the property is not necessary, but that an action brought to marshall property is sufficient. *Princess Lida v. Thompson*, U.S. at 466, S. Ct. at 280, L. Ed. at 291. The purpose of this rule is to avoid conflict between the courts. While *Princess Lida* involved a conflict between a state and a federal court, this Court made it clear that the principal applies to the federal courts as well. Id. This Court's holding in *Princess Lida* is both venerable and oft cited.

The class action was the first action directed to marshalling the assets defrauded from investors, and clearly the first action asserting jurisdiction through court order directly upon the funds ultimately recovered from Barclays Bank.[10] Thus, the Tenth Circuit has cre-

10. That the funds were permitted by the District Court of New Jersey to be placed in the hands of the Colorado Court to expedite transfer back to the United States was not any abnegation of jurisdiction, but rather an effort to safeguard investors under the logical assumption that the criminal court would cooperate with the

ated an exception to what has come to be known as the *Princess Lida* rule which would grant a jurisdictional preference to criminal courts over civil courts. An exception to a rule of law created by the United States Supreme Court should not be created by a lower court, but should come from this Court if intended.

B. The holding of the Tenth Circuit will immensely complicate criminal proceedings and is in conflict with the holdings of other circuits requiring specificity of sentencing.

Normally a criminal proceeding at the District Court level terminates upon sentencing. While a criminal court may exercise some supervisory responsibility over matters involving probation, the judicial time necessary to effectuate that oversight is generally minimal. However, by its holding the Tenth Circuit has raised the spector that criminal proceedings will drag on interminably. The impact on the criminal justice system, both in terms of general backlog and fairness to individual defendants could prove devastating.

As noted earlier in this petition, the criminal judge in this case envisions a series of "entitlement hearings" to set the amount of money to be given to individual investors and individual groups of investors. Some of these hearings will run only a few minutes, but sorting out conflicts regarding some investors may, by admission of the judge hearing the criminal matter, require individual hearings as long as 20 weeks in length. The entire receivership process as envisioned by the criminal court will be extremely lengthy. This would necessarily always be the case if the procedure sanctioned by the Tenth Circuit is followed. This will make a mockery of *Rule* 50 of the Rules of Criminal Procedure. (Requiring prompt disposition of criminal matters and the granting of priority to

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civil court. (App. 22) *Cf. United States v. Roberts, supra*, discussed at pp. 11-12.

criminal cases). This is precisely the problem which Congress foresaw in the recently enacted P.L. 97-291, 18 U.S.C. §3579, §5(a) (4) (d) (enacted subsequent to the creation of the receivership by the criminal court) which, while generally expanding the power of the federal courts to Order restitution, provided that a restitutionary order should not be entered if to do so would "unduly complicate or prolong the sentencing process." The Senate Committee report recommending the legislation specifically stated that it was Congress' intent that resitutionary orders not be entered in complex cases such as the one herein. Congress did not intend that criminal cases spawn a host of complex ancillary proceedings. Senate Report No. 97-532 concerning P.L. 97-291, appearing in Volume 9, November 1982, United States Congressional and Administrative News, p. 2539.

Further, the Federal Rules of Criminal Procedure are totally inadequate to deal with the type of practice sanctioned for the first time by the Tenth Circuit. It is obvious that discovery will have to be held, but nowhere is it provided for under the Federal Rules of Criminal Procedure. While *Rule* 57(b) can be repeatedly invoked as a situation develops, such invocation makes *Rule* 57(b) into a "catch-all" provision, a result which its framers explicitly eschewed. *See, e.g.*, 8B, Moore's Federal Practice §57.63 at 57-4 (2nd ed. 1965). By contrast, appropriate rules of procedure are explicitly provided for under the Federal Rules of Civil Procedure (*e.g.*, *Rules* 23 [class actions], 26 *et seq.* [discovery procedure], 66 [appointment of receiver]).

Similarly, the procedure set forth by the Tenth Circuit fails to take into account the havoc which would be caused in the event a verdict is overturned or a plea successfully withdrawn. Indeed, the defendant in the instant case has a motion pending to withdraw his plea. The entire restitutionary scheme would necessarily col-

lapse, resulting in total confusion. This again emphasizes the inadequacy of the criminal courts to effectuate the scheme approved by the Tenth Circuit.

Assuming that the District Court below Ordered restitution on the authority of 18 U.S.C. §3651,[11] the restitutionary Order is fatally flawed and is in direct conflict with the case law of the other Circuits. Restitution was ordered to be made an unknown number of defrauded investors defrauded of unknown amounts. Indeed, it was the responsibility of the receiver appointed by the criminal court to seek out the identities of investors and determine the amount defrauded. Thus, the restitutionary scheme is in direct conflict with the holdings of other Circuits that in any order of restitution the "actual loss" or "loss caused" is to be "identified with exactitude" and that the aggrieved parties must be reasonably identified. *United States v. Hoffman*, 415 F.2d 14, 21-22 (7th Cir. 1970), *cert. den.* 396 U.S. 958, 90 S. Ct. 431, 24 L.Ed.2d 423; *United States v. Runck*, 601 F.2d 968 (8th Cir. 1979), *cert. den.* 444 U.S. 1015, 100 S. Ct. 665, 62 L.Ed.2d 644; *United States v. Mancuso*, 444 F.2d 691 (5th Cir. 1971); *Whitehead v. United States*, 155 F.2d 460, 462 (6th Cir. 1942), *cert. den.* 329 U.S. 747, 67 S. Ct. 66, 91 L.Ed. 644; *United States v. Taylor*, 305 F.2d 183, 187 (4th Cir. 1962); *Dougherty v. White*, 689 F.2d 142, 144 (n.1) (8th Cir. 1982). Associate Justice Clark, writing for the Fifth Circuit in *United States v. Mancuso*, *supra*, in reviewing a restitutionary order issued in a mail fraud case, explicitly refused to accept a restitutionary order which was not specific, and

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11. There is doubt on the point for 18 U.S.C. §3651 was never invoked by the District Court hearing the criminal matter since the funds were transmitted to the United States prior to sentencing, since the receivership was created prior to sentencing, and since the defendant was incarcerated and not immediately placed upon probation. However, no other statutory basis for restitution existed at the time the receivership was created. *See, e.g., Dougherty v. White*, 689 F.2d 142, 144 (8th Cir. 1982).

indicated that it was inappropriate to delegate such important matters as the determination of amount defrauded to a probation officer. In *United States v. Hoffman, supra*, the Seventh Circuit, also in a fraud case refused to allow a delegation to the Illinois Director of Insurance to determine "aggrieved parties" and the "amount defrauded." Though the Tenth Circuit permitted the delegation of responsibility to a receiver to determine the identity of individuals defrauded and the amount owed, the principle is identical to that rejected in *Mancuso* and *Hoffman* and in direct conflict with those cases.

Consequently, it is respectfully submitted that the decision of the Tenth Circuit below creates a clear conflict among the Circuits and creates undesirable complexity in criminal actions and should therefore be reviewed by this Court.

C. A serious question exists as to whether a criminal court has the statutory authority to create a receivership.

The Court below held that the power to create a receivership "should be considered implicit in the power to order restitution" under 18 U.S.C. §3651. This implied power may be exercised through *Rule* 57(b) of the Rules of Criminal Procedure, according to the holding of the Tenth Circuit.

It is axiomatic that the federal courts are courts of limited jurisdiction and as such have only such powers delegated by federal statute or by the United States Constitution. *E.g., Owens Equipment and Erection Co. v. Kroger*, 437 U.S. 365, 98 S. Ct. 2396, 57 L.Ed.2d 274 (1978); Vol. 1, Moore's Federal Practice, p. 627. *See, also*, Article III, §2, Clause 1 of the United States Constitution. Thus, if the power to create a receivership has not been delegated, the creation of that receivership is without jurisdiction. Yet, there is nothing in the legisla-

tive intent behind 18 U.S.C. §3651 which implies the power for a criminal court to create a receivership and deal with the matters ancillary to locating victims, holding entitlement hearings, and the like.

The legislative history of the Probation Act (now 18 U.S.C. §3651) was extensively discussed by this Court, in *United States v. Murphy*, 275 U.S. 347, 48 S. Ct. 146, 72 L.Ed. 309 (1928). There is nothing in the legislative history of the Probation Act which grants implied powers to create a receivership and, indeed, the legislative history evidences nothing more by Congress than the desire to follow the suggestion of the Court in *Ex parte United States*, 242 U.S. 27, 52, 37 S. Ct. 72, 61 L.Ed.2d 129 (1916) to enact legislation authorizing probation. In the more than fifty years since the enactment of the Probation Act, never before has it been interpreted to authorize the creation of a receivership. Thus, the holding of the Tenth Circuit represents a radical departure from existing law.

Similarly, the interpretation given to *Rule* 57(b) of the Rules of Criminal Procedure represents a radical departure from previous interpretations and the intent of its framers. The Tenth Circuit apparently interprets 57(b) as containing a substantive grant of power to the federal criminal courts. Yet, as the Advisory Committee on Rules clearly states, *Rule* 57(b) was intended merely to give flexibility "as to some matters of detail . . ." such as "the mode of impaneling a jury, the manner of selecting a foreman of a jury trial, the matter of sealed verdicts, the order of counsel's arguments to the jury and other similar details."

Volume 8B of Moore's Federal Practice, §57.03 is similarly specific:

> Subdivision (b) was intended to eliminate any requirements of conformity to state procedure. . . *Subdivision (b) is not a catchall which justifies de-*

parture from existing policy and practice on matters of substance by an individual judge. (emphasis added).

The United States Court of Appeals for the Tenth Circuit has, in the opinion below, given a radical new interpretation to both 18 U.S.C. §3651 and *Rule* 57(b) of the Rules of Criminal Procedure. These interpretations represent a significant departure from previously established law in areas of considerable importance. This Court is therefore respectfully urged to grant this petition.

D. The holding below raises serious questions concerning the substantive and procedural due process rights of the class of investors defrauded by Trenton H. Parker and International Mining Exchange, Inc.

The funds recovered were not the funds of the defendants. The funds recovered were funds which were to have been held in escrow by the defendants, but which belonged to defrauded investors. (App. 9)

The criminal court, however, seized the funds and made them part of a restitutionary scheme without allowing the true owners of the funds to be heard and precluding their counsel from even attending the untranscribed hearing at which the receivership in question was created. Indeed, as was noted in the district court's opinion, there is no method under the Rules of Criminal Procedure for the class aggrieved by the defendants to become parties to the "criminal proceedings," and it has not been permitted in this case. (App. 34)

Thus, serious questions of both substantive and procedural due process arising under the Fifth Amendment to the United States Constitution are raised by the novel procedure sanctioned by the Tenth Circuit. These questions are of significant constitutional dimension and should be resolved by this Court.

CONCLUSION

The ruling below manifests an extreme departure from existing law and, if allowed to stand, is likely to cause procedural chaos and conflict between federal civil and criminal courts. It is therefore respectfully requested that this Court grant this petition.

Respectfully Submitted,

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Dated: May 2, 1983

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 81-CR-122

UNITED STATES OF AMERICA

Plaintiff,

v.

TRENTON H. PARKER, *et al.*,

Defendants.

ORDER AUTHORIZING RECEIVER

The United States has moved for the appointment of a receiver collateral to this case to effect restitution to persons defrauded as a part of a scheme of defendants. The defendants join in the request for such appointment and have agreed that cash funds and certificates of ownership for gold and silver bullion held by Barclay's Bank, Georgetown, Grand Cayman, be delivered to Daniel T. Smith and Robert T. McAllister, to be by them delivered into the Registry of the Court.

Accordingly, it is ordered that upon receipt of such funds and certificates of ownership for gold and silver bullion, the Clerk of this Court shall deliver and pay over such certificates and funds to the receiver to be hereafter named to hold in custodia legis. The receiver is ordered to invest such funds in Treasury Bills, certificates of deposit, or in other authorized and legal instruments pending the making of restitution to the defrauded investors. The Receiver is ordered to ascertain as promptly as possible the persons entitled to the funds and proceeds of the bullion certificates, and, subject to the approval of the Court, to make restitution to the defrauded investors on a pro rata basis, less fees and expenses to be approved by

the Court. The Receiver to be named shall not employ private counsel pending further order of the Court, and, at least for the present, the Receiver shall use as counsel the United States Attorney for the District of Colorado, or one of his assistants.

Dated this 9th day of February, 1982.

/s/ Fred M. Winner
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ELIZABETH EKEN, et al.,
Plaintiffs,

vs.

INTERNATIONAL MINING EXCHANGE, INC., et al.,
Defendants.

Honorable Herbert J. Stern
Civil Action No. 81-3990

ORDER OF JUDGEMENT
(Filed April 16, 1982)

This matter having come before the Court upon the application of counsel for plaintiffs, Dines, English & O'Kane, Esqs., (Patrick C. English, Esq. appearing), and the Court having considered the affidavits and brief in support of motion along with a transcript of a plea entered by Trenton H. Parker and International Mining Exchange, Inc., and it appearing that defendants Trenton H. Parker and International Mining Exchange, Inc., Wellington International Bank & Trust, Ltd., Arum and Argentum, Ltd., United Swiss Commonwealth Bank and Trust Group, Deutsch Kroenll Mineralisch Anstalt, Seagull Creek Silver, Ltd., and Compagnie Miniere Paul

Isnard Internation, have been served and have failed to respond; and for good cause shown;

It is on this 11 day of April, 1982,

ORDERED, that judgment be entered in favor of the plaintiffs and against the above named defendants, jointly and severally, in the amount of eight million one hundred thousand ($8,100,000.) dollars plus costs and reasonable counsel fees, as prayed for in the Complaint, provided that the amount of counsel fees shall be entered by separate Order of the Court; and it is

FURTHER ORDERED, that the amount of this judgment may be reopened upon application of the plaintiffs if the amount involved in the "Gold Tax Shelter Investment Program" offered by defendants is shown to be in excess of eight million one hundred thousand ($8,100,000.) dollars.

/s/ Herbert J. Stern

HERBERT J. STERN, U.S.D.C.J.

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

ELIZABETH EKEN, et al.,

Plaintiffs,

v.

INTERNATIONAL MINING EXCHANGE, INC., et al.,

Defendants.

Civil Action No. 81-3990

ORDER

The Court having determined that adjudications with respect to individual members of the class would substantially impair or impede the ability of other class members not parties to the adjudications to protect their interests;

It is on this 3rd day of May, 1982,

ORDERED that the final paragraph of the Court's order of April 16, 1982 provisionally certifying the instant action as a class action be, and it hereby is, amended to read as follows:

ORDERED that the instant action is hereby provisionally certified as a class action pursuant to Fed. R. Civ. P. 23(b)(1) and Fed. R. Civ. P. 23(b)(3) on behalf of the following class:

All persons and entities investing in the "Gold Tax Shelter Investment Program" of the International Mining Exchange, Inc.

HERBERT J. STERN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

ELIZABETH EKEN, WILLIAM JOHNSON and JOHN DOES 1-50,

Plaintiffs,

vs.

INTERNATIONAL MINING EXCHANGE, INC., TRENTION H. PARKER, R. STEPHEN SPANGLER, JAMES T. WILSON, ADRIAN DOYLE, ROBERT NORWOOD, DWAIN SARBY, AL JORDAN, SEYMOUR FEDER, FEDFRATED SECURITIES, INC., RICHARD ROES 1-400, MARY SMITHS 1-10, WELLINGTON INTERNATIONAL BANK & TRUST LTD., AMERICAN HILL PLACER, LTD., UNITED SWISS COMMONWEALTH BANK & TRUST GROUP, LTD., SEAGULL CREEK SILVER, LTD., ARUM AND ARGENTUM, LTD., DEUTSCHE KROENLL MINERALISCH ANSTALT, COMPAGNIE MINIERE PAUL ISNARD INTERNATIONAL, LARRY HERCULES, PAUL ISNARD, HARLEY PETERS, JEROME SCHNEIDER, W.F.I. CORPORATION, "CUNNINGHAM, RICHMAN, APPLEBY, POTTER AND YOUNG", JEFF PARKER a/k/a JEFF MERCK.

Defendants.

Honorable Herbert J. Stern
Civil Action No. 81-3990

ORDER

This matter having come before the Court on September 13, 1982, upon the application of counsel for the class of "persons and entities investing in the Gold Tax Shelter Investment Program of the International Mining Exchange, Inc.". (Dines, English & O'Kane, Patrick C. English, Esq. appearing), in the presence of counsel for defendant Larry Hercules (Lum, Biunno & Tompkins, Robert J. Kelly, Esq. appearing), upon consideration of the moving papers and the record of this action, and it appearing that this Court originally asserted jurisdiction by Order of January 29, 1982, over certain funds recovered and under the signature of defendant, Trenton H. Parker, and held in Barclays Bank International, Grand Cayman Branch;

And it further appearing that a sum in excess of five million dollars was recovered for the benefit of the class from accounts held by Barclays Bank International, Ltd., under the signature of Trenton H. Parker;

And it further appearing that a representation was made to this Court that speed of transfer was necessary to protect the class of investors, and upon the acknowledged request of the Office of the United States Attorney for the District of Colorado transmitted through counsel for the class, this Court executed Orders allowing the funds held in Barclays Bank International, Ltd. to be transmitted to the United States District Court for the district of Colorado for safekeeping pending further action;

And it further appearing that the sums recovered do not constitute the full amount of monies invested by the class in the Gold Tax Shelter Investment Programs marketed by defendants Trenton H. Parker and International Mining Exchange, Inc.;

And it further appearing that the sums recovered are unlikely to be sufficient to repay to investors the full amount of monies invested by them and in recognition of the fact that certain investors are, through independent legal action, seeking to collect disproportionate judgments many times in excess of their investment and which would leave relatively little money for distribution to the class, and that therefore this Court on April 16, 1982 and May 3, 1982 entered Orders provisionally certifying this action as a class action under *Rule* 23(b)(1) and 23(b)(3) of the Federal Rules of Civil Procedure;

And it further appearing that the funds recovered constitute monies of investors which were to have been held in escrow by defendants Trenton H. Parker and International Mining Exchange, Inc. pending certain transactions which were never consummated and hence are a constructive trust for the benefit of all investors in the "Gold Tax Shelter Investment Program";

And it further appearing that there have been filed in the appropriate United States District Courts in Colorado two transcripts of hearings held by this Court in which specific requests were made that the funds recovered and which were originally the subject of this Court's January 29, 1982 Order be transmitted to the custody of this Court for distribution as part of the pending class action;

And it further appearing that these requests have not been honored to date;

And it further appearing that the issue of whether the funds held in Denver should be transmitted to a receiver appointed by this Court is presently before the United States Court of Appeals for the Tenth Circuit;

And it further appearing that the Midlantic National Bank has been appointed by this Court as receiver

to invest funds recovered at the highest rate of interest consistent with the protection of those funds;

And it further appearing that the funds recovered from Barclays Bank International, Ltd. have been placed in short term certificates of deposit;

And it further appearing that it is appropriate to set up a mechanism to facilitate the transfer of funds with no loss of interest in the event that the United States Court of Appeals for the Tenth Circuit rules that funds recovered for the benefit of the class of investors should be transferred to the control of this Court;

It is therefore on this 15th day of September, 1982,

ORDERED, that funds recovered from Trenton H. Parker and International Mining Exchange, Inc. be considered a constructive trust on behalf of those individuals and entities who invested in the Gold Tax Shelter Investment Program promoted by Trenton H. Parker and International Mining Exchange, Inc., and that the Midlantic National Bank be appointed as receiver to take control over and administer as a constructive trust on behalf of investors funds recovered in the event that the United States Court of Appeals for the Tenth Circuit rules that funds recovered should be transferred to the control of this Court; and it is

FURTHER ORDERED, that transfer should be effectuated, if permitted by the United States Court of Appeals for the Tenth Circuit, in such a way as to avoid to the fullest extent possible any loss of interest; and it is

FURTHER ORDERED, that no additional fees shall be charged by the receiver by reason of this Order; and it is

FURTHER ORDERED, that counsel for the class of investors defrauded by Trenton H. Parker and Interna-

tional Mining Exchange, Inc. shall file copies of the Complaint in the underlying action and this Order in the District Court for the District of Colorado within ten (10) days of the entry of this Order.

HERBERT J. STERN, U.S.D.C.J.

APPENDIX E

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

CIVIL NO. 81-3990

ELIZABETH EKEN, et al.,

Plaintiffs,

vs.

INTERNATIONAL MINING EXCHANGE, INC., et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Newark, New Jersey
April 16, 1982

BEFORE:

THE HONORABLE HERBERT J. STERN, U.S.D.J.

APPEARANCES:

DINES, ENGLISH & O'KANE, ESQS.,
BY: PATRICK C. ENGLISH, ESQ.,
Attorneys for the Plaintiffs

PURSUANT TO SECTION 753 TITLE 20 UNITED STATES CODE FOLLOWING TRANSCRIPT IS CERTIFIED TO BE AN ACCURATE RECORD AS TAKEN

STENOGRAPHICALLY OF THE ABOVE ENTITLED PROCEEDINGS.

By: /s/ Stanley B. Rizman,
STANLEY B. RIZMAN,
Court Reporter

* * *

(2) THE COURT: . . . I have determined that the following would be appropriate so far as this Court is concerned. If I understand the history of this case correctly, it was this Court that restrained the movement of those six million (3) dollars or so when they were in the Bahamian banks, isn't that true?

MR. ENGLISH: That is so.

THE COURT: It was on your application based upon the representation made that the defendant would pay that money into court for the benefit of class members represented here, namely, the victims of his crime. Then I relaxed that order and permitted it to be transferred to Colorado, isn't that so?

MR. ENGLISH: That is so. It was done on my affidavit and you said just that.

THE COURT: Now, Mr. English, I'm perfectly satisfied that Judge Winner is motivated solely by a desire to make certain that the victims of the criminal conduct portrayed before him are adequately reimbursed. Indeed, as far as I'm concerned, the matter isn't even open to question. Undoubtedly, it was his desire to make certain that those monies would be safeguarded for the victims who are, of course, the class members in this case. And it is for that reason, unquestionably, that he appointed a receiver. In all these things I am certain that he acted and did act in the interest of all concerned.

With the signing of this order, you now have a judgment in the amount of $8,100,000. While the funds in

Colorado are not sufficient to fully cover the amount of (4) this judgment as far as I understand it anyway, they are sufficient to go a long way towards recompensing the members of this class.

In the interest of those class members, you should go to Colorado and promptly register this judgment with the District Court in Colorado and notify the Receiver.

MR. ENGLISH: Yes, sir. That has already been done, not the aspect of registering, but notification of the Receiver has already been made by me.

THE COURT: Now, I understand it was Judge Winner's contemplation that the Receiver would be the one to make dispensation of the money and to decide who should get what, that is, as among the victims of the crime.

I, however, know of no way that the Receiver can do that. It would be tantamount to instituting a new class action there.

MR. ENGLISH: I agree, your Honor.

THE COURT: So far as I understand it, there is nothing pending before the Receiver or any District Judge there with the exception, I think, perhaps two plaintiffs who have brought individual lawsuits there, is that right?

MR. ENGLISH: That is correct.

* * *

(5) THE COURT: I understand further than under Judge Winner's order, he appointed—in the interest of saving expense to our class members here, he appointed the United States Attorney.

MR. ENGLISH: That is so. I have been so informed. I have been in contact with the U.S. Attorney as well.

* * *

THE COURT: Well, in any event, it seems to me the money is now paid into court there, but there is no civil litigation or any litigation pending nor any way for the Receiver to determine who among the class members should get what.

MR. ENGLISH: That is correct.

THE COURT: That is, of course, the whole purpose of this litigation here.

(6) THE COURT: I don't wish you to wait, because I am advised that Judge Winner may not be available after April the 28th.

MR. ENGLISH: Yes, sir.

THE COURT: This matter should be presented to him.

MR. ENGLISH: Yes, sir.

THE COURT: I am quite confident that he will do the appropriate thing.

MR. ENGLISH: Yes, sir. Thank you.

THE COURT: I don't know what he'll do. But you are to bring to his attention the fact that those funds were originally frozen for the benefit of the class members represented by this lawsuit pursuant to an order out of this Court.

MR. ENGLISH: Yes, sir.

THE COURT: That that order was relaxed temporarily for the purpose of bringing the money back into the country to safeguard it for the purpose of protecting these class members.

You should also bring to the Court's attention there the fact that you have received a judgment out of this Court and if you think it appropriate, that you wish to

satisfy that judgment out of the funds being held in the (7) registry of that Court apparently for the very purpose of satisfying the claims of the people who are represented by this class.

I gather the class is made up solely and exclusively of the victims of the crime, is that right?

MR. ENGLISH: That is correct.

THE COURT: That is, committed by International Mining Exchange and the individuals who were convicted before Judge Winner, is that correct?

MR. ENGLISH: That's correct.

THE COURT: I gather further that all of the victims are represented by this class with the possible exception of two plaintiffs out there, is that correct?

MR. ENGLISH: That's correct. I know of no other litigation whatsoever.

THE COURT: If you think it appropriate, you may present an order to the Court in Colorado directing the Receiver to pay the money into the Court in the District of New Jersey to be used pursuant to the further orders of this Court to satisfy the claims of the class members who are pending before it.

If you wish to, and if counsel for the two plaintiffs there have no objection, they may sign their consents. You should certainly present a copy of the proposed order to the United States Attorney for the District of (8) Colorado. He may, of course, if he chooses, either consent or not. That is entirely his business. Ultimately, it will be for Judge Winner to decide whether or not to release the funds which he has impounded. I'm certain unless there is good cause, he will do so. If not, then you should pursue any remedies which you feel you are entitled to there.

MR. ENGLISH: Yes, sir, I will.

* * *

THE COURT: But, on the other hand, I remain morally certain that Judge Winner, motivated as he is by a desire to be certain that these moneys are used for the benefit of these class members who are presently before this Court, will undoubtedly do whatever he can do to seek that end. You may order a copy of these minutes and present them as part of your application.

MR. ENGLISH: Thank you very much, your Honor, I shall do so.

THE COURT: I think it should also be said—I think I have never seen you before, have I, since the (9) institution of this lawsuit?

MR. ENGLISH: Yes, sir, you have. I appeared before you most notably in—trying to think of the case—went to the Third Circuit. And your judgment, which happened to be in favor of my clients, was sustained before the Third Circuit.

THE COURT: I don't remember the case.

MR. ENGLISH: I was representing the Clifton Board of Education. It was Carson versus Clifton Board of Education, federal civil rights action.

THE COURT: How long ago was that?

MR. ENGLISH: Approximately a year and a half ago.

THE COURT: That you were before me?

MR. ENGLISH: Yes, sir.

THE COURT: I'm sorry. I didn't remember you. But in any event, I don't think there has ever been any connection between your firm and this Court.

MR. ENGLISH: No, sir.

THE COURT: I didn't know anything about this lawsuit. But I do feel—unless Judge Winner disagrees—I do feel the only way to properly get this money into the hands of the people that Judge Winner would like to is through the vehicle of a class action which has been here. Did your suit here begin prior to the institution of the two civil (10) cases out there?

MR. ENGLISH: No, it did not, your Honor. The two civil cases out there were instituted quite previous to the action.

THE COURT: But the attorneys representing those clients are in favor of sending the money here, is that right?

MR. ENGLISH: I believe so. I have discussed it with both of them. They voiced no objection to me. Their interest is in protecting their clients as they feel most appropriate.

THE COURT: Well, how much are they suing for?

MR. ENGLISH: Well, they have—there is a judgment extant in the amount of four million dollars. I don't believe that is a final judgment. That is based upon, as you can see, considerable punitive. The one investor out there invested, I believe, approximately $10,000. The other investor, through his corporation and personally, invested a total of $500,000 in this scheme.

THE COURT: Obviously, it would be very important to conserve what assets we can.

MR. ENGLISH: Yes, sir.

THE COURT: And to fairly dispense them among all those who have lost money.

MR. ENGLISH: Yes, sir.

(11) THE COURT: I know of no way for the Receiver to do that sua sponte, nor do I know of any way for the

United States Attorney to act as counsel in what is essentially a private litigation.

MR. ENGLISH: I am aware and I can state that the U.S. Attorney's office has expressed concern over that very point.

THE COURT: Not only that, but there are likely to be conflicts among the claimants. And I think that could only be properly supervised within the context of a civil lawsuit. But, in any event, I'm sure Judge Winner will be very grateful to have this information.

I would suggest that you present it at an early opportunity—an order, a clean order, simply certifying the class.

MR. ENGLISH: That will be done this afternoon, your Honor.

* * *

(12) THE COURT: I'm very anxious that this matter proceed while Judge Winner is available because I think that it is only proper that it should be presented directly to him.

MR. ENGLISH: Yes, sir.

THE COURT: We should not in any way delay because he may be unavailable. I wouldn't want that to happen.

MR. ENGLISH: I already retained local counsel in Denver in the hopes we could move expeditiously. I have already informed the trustee in writing of the fact that an application would be made and the background of the entire situation.

THE COURT: All right. Thank you.

MR. ENGLISH: Thank you, your Honor.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL. NO. 81-3990

TRANSCRIPT OF PROCEEDINGS

ELIZABETH EKEN, et al.,
Plaintiffs,

vs

INTERNATIONAL MINING
EXCHANGE, INC., et al.,
Defendants.

Newark, New Jersey
June 11, 1982

BEFORE:
THE HONORABLE HERBERT J. STERN, U.S.D.J.

APPEARANCES:

DINES, ENGLISH & O'KANE, ESQS.,
BY: PATRICK C. ENGLISH, ESQ.,
ATTORNEYS FOR THE PLAINTIFFS.

LOWENSTEIN, SANDLER, BROCHIN, KOHL,
FISHER & BOYLAN, ESQS.,
BY: GERALD KROVATIN, ESQ.,
ATTORNEYS FOR TRENTON PARKER.

GERALD RAFFERTY,
ASSISTANT UNITED STATES ATTORNEY
FOR THE DISTRICT OF COLORADO,
FOR THE UNITED STATES.

LUM, BIUNNO & TOMPKINS, ESQS.,
BY: WILLIAM S. WACHENFELD, ESQ.,
ATTORNEYS FOR LARRY HERCULES.

* * *

(8) THE COURT: Perhaps you can clarify something for me. The restraining order that we entered not only restrained those banks, but also restrained Mr. Parker, did it not?

MR. RAFFERTY: Yes, your Honor, it did.

THE COURT: Clearly, this Court has authority over Mr. Parker.

MR. RAFFERTY: Yes, your Honor.

(9) THE COURT: So that even if it were so—and I have no reason to doubt you. I mean, I don't mean—

MR. RAFFERTY: Understood.

THE COURT: Undoubtedly, they told you those things. Perhaps they meant them.

By the way, I agree with Judge Pollock. This whole business is a mess. And the thing is if these foreign banks do business in the United States, they have to obey the orders of the Courts here. There is in personam jurisdiction. If there is any doubt about it—they may say they won't obey. These Courts of ours have ways of making them obey, if it comes to that.

But putting that to the side, even if it were to obey Trenton Parker's orders, he must obey our orders. This Court had restraints entered by it alienating that money or conveying this money. He's an American citizen. He's within the jurisdiction of the United States. Finally, he's a defendant in this Court, and was at the time. So we had jurisdiction.

Nonetheless, this is not an instance where this Court is desirous of credit or in any respect thinks that the money ought to be here because we tied it up. That's not the issue. We all represent the same interests here. Particularly you, Mr. United States Attorney. You may be an United States Attorney for the District of (10) Colorado, but you are the United States Attorney for the United States of America.

The same with me. I may be District Judge here. But that merely means I have to serve here. My interest is to enforce the laws of the United States for the benefit of everybody here. We are not in some parochial joust.

Now, our task here, yours and mine, I think, is to be sure that such funds as you may have marshalled—your efforts, thanks to your efforts—I didn't know you traveled that way. I think it is deserving of the highest priase that you were able to achieve these things.

When Mr. English came to me and said it's in the interest of everybody to relax the restraint, why, of course I would do so. I have never considered that this would mean that the litigants before this Court would be deprived of the money or that two or three litigants would seize on it to take an entirely disproportional share to the grave injury of others. Such a thought never crossed my mind. It would be unthinkable.

I was working in cooperation with your office, and you're the Court there. Because that's what I'm supposed to do, I think.

And as you stand before me now, you can't be (11) on the side of any individual civil litigant, can you?

MR. RAFFERTY: None whatsoever, your Honor.

THE COURT: Your interest has to be, I would think, to be impartial amongst all potential litigants and to do

such things as are calculated to do so. Everybody who had been injured should get a fair share of redress.

Have I stated that properly?

MR. RAFFERTY: That's correct, your Honor.

THE COURT: How are we going to achieve that, sir?

MR. RAFFERTY: Your Honor, pursuant to the assignments, we brought the money back to the United States. It was put in the name of Mr. MacAllister, the Assistant United States Attorney.

At the time of sentencing on March 26th, the government moved for the appointment of a Receiver by Judge Winner for the purpose of effecting restitution. We certainly didn't want Mr. Parker to be doing his own restitution.

THE COURT: Now, without the slightest suggestion of recrimination to you, for I have none for you, there was at that moment a class action pending before me here. That's true, isn't it?

MR. RAFFERTY: That is, your Honor.

THE COURT: And represented in that class (12) were all of the people who were—what would you call them? The restitutees. The people to whom restitution should be made.

MR. RAFFERTY: Yes, your Honor.

THE COURT: And we have here in the form of a lawsuit the machinery for making restitution, for apportioning moneys if there be less than sufficient to give to everyone. The full measure of hurt.

Isn't that right?

MR. RAFFERTY: That is true, your Honor.

THE COURT: How is a Receiver in Colorado going to do that? I mean, how is he going to determine how much the class members presently suing in New Jersey should get?

MR. RAFFERTY: They should get—just as the Court noted earlier, I believe he should determine it based on their investment. All they are getting back is the investment they made, your Honor. And they do that on a pro rata basis with all of the—by the way, I should say, a year and a half's investigative work turned over to them by the United States Attorney's office.

THE COURT: Is the the position of the United States Attorney's office for the District of Colorado that it is appropriate for a Receiver there to determine how much of that money each one of these people should get?

(13) MR. RAFFERTY: Based on their claims. Cancelled checks. Yes, your Honor, it is.

THE COURT: I gather it is your position this the money should not be transferred here?

MR. RAFFERTY: That is, your Honor, for the simple reason the Court has ordered restitution on a pro rata basis by a Court-appointed Receiver. No litigation is required. The Receiver is just going to send out notifications to all the class members. We don't have a class, you understand.

THE COURT: Where is the jurisdiction? There is nothing pending in that court, so far as I understand it. It's a criminal matter that ends with the sentencing of the defendant. The Receiver—as a matter of fact, the Receiver has been served with a judgment emanating from this Court.

MR. RAFFERTY: Your Honor, two things. I think Judge Winner and yourself are of the same opinion, because at the sentencing Judge Winner ordered the Re-

ceiver not to reveal where he put the moneys for all of the investors for this purpose. To avoid those two large judgment creditors in Colorado from doing any type of garnishment.

THE COURT: I am—I am breathless. You tell me that a Court-appointed Receiver has been ordered (14) by the Judge to conceal the locus of the fund?

MR. RAFFERTY: To prevent garnishment by the two judgment creditors.

THE COURT: To prevent the execution of orders of a court?

MR. RAFFERTY: Not—your Honor, as I understand it, garnishments have been served in an attempt to execute, but Judge Winner's concern is that—

THE COURT: You mean the Receiver is hiding the money from this Court here?

MR. RAFFERTY: No, your Honor. This Receiver is not hiding the money from the Court.

THE COURT: A Judge there has ordered the Receiver there to disregard orders from this Court here?

MR. RAFFERTY: No, your Honor. He's not ordering the Receiver to disregard the Court's order. Judge Winner's concern is only to make a pro rata restitution to all of the investors, your Honor. And on top of the criminal proceeding was overlaid a class action.

THE COURT: On top of the proceeding was overlaid a class action?

MR. RAFFERTY: In this regard. We have concurrent actions going on, the criminal proceeding started in December 1981 with an indictment in July of (15) '81. The criminal proceeding resulted in a plea agreement with an agreement for restitution at the same time this Court was proceeding along on a class action matter.

The Court is correct. Our only concern is to return the money on a pro rata basis. We asked for restitution to be a condition of probation. And Judge Winner ordered the restitution be made as a condition of probation but didn't want Mr. Parker to be in charge of that, nor did we.

THE COURT: Obviously. I fault not anybody in requiring the moneys to be disgorged. That was the right and necessary thing to do. Nor do I have any quarrel with the appointment of a Receiver. How else can the money be controlled? But, beyond that, I am sitting here wondering what kind of legal system I'm in, frankly.

There is no civil matter pending before Judge Winner. I would suppose, normally, what Judge Winner would have in mind is that where there is a legal proceeding pending, calculated in fact to make class members whole, I would have supposed that what he intended was to require Trenton Parker to disgorge all moneys via a Receiver into the hands of the Court, which is then in the process of adjudicating how much of such moneys that can be found should be given over to those who have been injured. And if all the money cannot be found, then in (16) what proportion it should be shared.

But to simply pay it into a Receiver and say, "Here, you figure it out," why, that is not to say that is all the money that there is. Nor is that to say that these people aren't entitled to judgments for more than that amount of money.

MR. RAFFERTY: Your Honor, but the class action requires an immense amount of litigation. And I submit to the Court that if you were to ask the class members which is the easiest, most inexpensive way for you to recoup your investment, I think the class members would say, "Let me file my claim with the Receiver. Give him a copy of my cancelled check and recoup my money."

And that's all the Court in Colorado and that's all the United States Attorney was trying to do. The simplest most expeditious means.

THE COURT: I am not accusing you of anything.

MR. RAFFERTY: I know, your Honor. But I'm just saying—

THE COURT: It is extraordinary. You can't simply—first of all, Trenton Parker may well owe to these people—he does, by my judgment, owe to these people more money than you have.

Second of all, where you have that situation, (17) you have to have an exploration to see whether you can find the rest of the money and get it.

Second of all, where you have a limited fund, it has to be apportioned. The Receiver will have to settle conflicting claims among different people. Some say they're entitled to more than other people. He has no power to compromise those claims.

One way of viewing it, perhaps, is to pick a pro rata share. That is not the only way to do it. It may well be that the lawyers who instituted the lawsuit in Colorado which, if I understand your presentation, may have brought this to your attention or were instrumental in helping you, they may be entitled to a counsel fee. It does not lie in the hand of a sentencing Court or a Receiver appointed by it, and certainly not the United States Attorney, to extinguish such claims or to de facto extinguish them by making sure that such moneys as are available don't come into their hands.

That's to be done, as I understand Article III of the Constitution on a case in controversy basis where claimants come before a Court. You know, there is a lot of easier ways to do things than to follow Article III of the Constitution.

I mean, if I have a criminal case and a man stole some money from a number of people—say he stole (18) 100,000 and I recovered 10,000, and there is a lawsuit pending between all those people and the man who stole it, I don't have the authority to simply say to the Receiver: Take the money and divide it up the way you should be.

That is, so far as I understand it—I tell you, I have been contemplating transfering this whole matter from me to the District of Colorado.

I don't want to get involved in an unseemly dispute with the federal judiciary in Colorado. I do not understand the interest of any Judge in such a matter once the criminal case ends. Except that I understood he wanted the assets marshalled and distributed. Once that money is found it is to be distributed.

I'm not in love with this case. I will not see these litigants here in some way deprived of their opportunity to fairly participate when, in fact, the entire class is before me. It is extraordinary to give the money that was transferred there with the help of this Court and then concealed so the litigants before this Court should not have an opportunity to litigate, if that's what they want to do.

And this lawyer before me here represents the class. He's the lawyer for them.

Well, if I have spoken with heat, forgive me. I tell you, it is extraordinary. This Court cooperated in (19) every way it could, whether it was second or third in line or what it may be. But it was our order which had restrained the money there and the money in the hand of Trenton Parker. I'm sure your Department would have honored our order.

MR. RAFFERTY: Our Department would have honored your order. No question, your Honor.

THE COURT: You would not as Receiver have given it to another Receiver without a relaxation of my order, would you?

MR. RAFFERTY: Correct, your Honor.

THE COURT: And I'm sure you would not wish to be in a position, however unwittingly, of depriving all of the class members of a fair opportunity to be heard in a litigation which is pending before the United States District Court.

* * *

APPENDIX G

UNITED STATES DISTRICT COURT

DISTRICT OF COLORADO

CASE NO. 80-K-850

ROBERT C. HERZFELD, *[Plaintiff]*,

v.

ROBERT C. HERZFELD, ADRIAN DOYLE, JAMES T. WILSON, STEPHEN SPANGLER, ROBERT E. NORWOOD, and INTERNATIONAL MINING EXCHANGE, a Colorodo corporation, *[Defendants]*.

CASE NO. 80-K-859

ROBERT F. BROWN, ROBERT A. BRANDT, and RFB PETROLEUM, INC., a Texas corporation, *[Plaintiffs]*,

v.

TRENTON H. PARKER, THE INTERNATIONAL MINING EXCHANGE, INC., a Colorado corporation, R. STEVEN SPANGLER, JAMES T. WILSON, ADRIAN DOYLE, and ROBERT NORWOOD, *[Defendants]*.

CASE NO. 82-J-17

ELIZABETH EKEN, et al., *[Plaintiffs]*,

v.

INTERNATIONAL MINING EXCHANGE, INC., et al., *[Defendants]*.

KANE, J.

MEMORANDUM OPINION AND ORDER

This melange of litigation began in 1980 with my granting summary judgment for the plaintiff in *S.E.C.* v. *International Mining Exchange, et al.*, 515 F.Supp. 1062 (D. Colo. 1981). Because the three captioned cases, as well as others, were

related, they too, were assigned to me in keeping with our Local Rules of Practice. Such serious questions regarding the orderly administration of justice and jurisdiction exist that I will make findings which will permit an immediate appeal from this order in accordance with 28 U.S.C. § 1292(b). Arguably, these same findings may make the appeal a matter of right in accordance with 28 U.S.C. § 1292(a)(2).

Cases 80-K-850 and 80-K-859 were consolidated in September, 1980. They are civil securities fraud actions against Trenton H. Parker, International Mining Exchange and others based on fradulent tax shelter investment schemes. On September 8, 1981, I entered judgment for the plaintiffs against the defendants, Parker and International Mining Exchange, for $4,058,501. On February 9, 1982, the defendants Parker and International Mining Exchange in criminal action 81-CR-122 in this district before Judge Winner pleaded guilty to charges arising from the fradulent schemes. Pursuant to a plea arrangement Parker agreed to turn over the proceeds of the fraudulent scheme to the custody of a court-appointed receiver.

On February 9, 1982, Judge Winner appointed William C. Lam as the receiver and Assistant United States Attorney Robert McAllister and the defendant's counsel, Dan Smith, as Trustees. Judge Winner's order provides that upon receipt of Parker's funds and certificates, the receiver shall invest the funds in treasury bills, certificates of deposit, or other legal instruments pending restitution to the defrauded investors.

On April 16, 1982 Judge Herbert J. Stern of the District of New Jersey entered judgment against the defendants Parker and International Mining Exchange for $8,100,000 in a class action based on the same fraudulent scheme. Three days later, those plaintiffs filed a certification of their judgment for registration in the District of Colorado. This action, 82-J-17, was also assigned to me.

On April 22, 1982 the plaintiffs in the consolidated Colorado civil cases, 80-K-850 and 80-K-859, served writs of garnish-

ment with interrogatories on the receiver and the trustees. On July 12, 1982 the New Jersey plaintiffs also filed writs of garnishment. The parties have filed briefs in support of and in opposition to the registration of the New Jersey judgment in Colorado. In addition there has been substantial briefing on several motions including a motion to consolidate the civil actions and transfer the funds to New Jersey, a motion to dismiss or quash the Colorado plaintiffs writs of garnishment, a motion for replevin and a motion to certify the motion to dismiss the writs of garnishment to Judge Winner in the criminal case, 81-CR-122. At the last hearing on this matter, I denied the motion to certify the motion to dismiss the writs of garnishment to Judge Winner and the New Jersey plaintiffs withdrew their motion for replevin. Accordingly, this matter is now before me on the motion to consolidate the cases and transfer the funds to the United States District Court for the District of New Jersey, and the motion to dismiss or quash the writs of garnishment.

It is conceded by all parties that permission has neither been sought from Judge Winner nor given by him to institute garnishment proceedings against the receiver, Mr. Lam, who was appointed by him in the criminal case, 81-CR-122. *See Bankers'* v. *Mortgage Co. of Topeka, Kan.* v. *McComb*, 60 F.2d 218 (10th Cir. 1932). The plaintiffs in the consolidated actions, 80-K-850 and 80-K-859, argue that there is no inherent power which permits United States District Courts to appoint a receiver in criminal proceedings. No authority has been cited by any party and I can find none which addresses this question. *United States* v. *Roberts*, 619 F.2d 1 (7th Cir. 1979) is suggested, but it is inapposite since the receiver was not appointed by the judge in the criminal case.

The plaintiffs in the New Jersey class action likewise assert that Judge Winner was without jurisdiction in the criminal case to appoint a receiver and they therefore seek to have the funds in the possession of the receiver transferred to the court in New Jersey and there to establish a receivership. Predictably the plaintiffs in the consoldated actions assert that their

garnishment is first in time and that a subsequently established receivership will not defeat it. The class action plaintiffs rejoin by asserting that Judge Stern in the class action was the first to acquire jurisdiction over the funds in question and thus the garnishment in the consolidated actions is subservient. Further, the class action plaintiffs assert that fundamental justice would be thwarted by allowing the consolidated action plaintiffs to satisfy their judgment which is heavily loaded with punitive damages because that satisfaction would deprive the members of their plaintiff class of any recovery. I am therefore asked by them to deny the consolidated action plaintiffs' garnishment and order the funds transferred to the United States District Court for the District of New Jersey.

The arguments presented share a penultimate element: in order to rule favorably on any of the motions I would be required to determine that the order of Judge Winner establishing the receivership and appointing Mr. Lam as receiver is void for want of jurisdiction. This I cannot and will not do. The law on this point in the Tenth Circuit is stronger than in most jurisdictions.[1] In *Humphrey* v. *Bankers Mortg. Co. of Topeka, Kan.*, 79 F.2d 345, 352 (10th Cir. 1935) the Court of Appeals said:

> . . . It is well settled that in such circumstances the deliberate judicial acts of one judge are not open to review by another judge of the same court having co-ordinate jurisdiction. That is a salutary rule of comity which rests upon sound considerations of necessity. Any other would strike down orderly procedure and substitute unseemly conflict in its stead. The respective orders approving the petition and appointing a trustee in the involuntary proceeding could be reviewed only by appeal to this court.

---

[1] There are numerous cases dealing with the problems inherent in one judge overruling another judge in the same case, but there are few cases reported involving a judge attempting to overrule another judge in a different case which deals with the same property. *See Annot. Propriety of Federal District Judge's Overruling or Reconsidering Decision or Order Previously Made In Same Case By Another District Judge*, 20 A.L.R. Fed. 13.

> They were not open to review by the other judge of that court in the voluntary proceeding.

From the foregoing it is obvious that Judge Winner's orders are not subject to my review. Therefore, I deny the motion to consolidate the cases and transfer the funds to New Jersey and I grant the motions to dismiss or quash the writs of garnishment.

Another point needs to be made in order to explain my use of 28 U.S.C. § 1292. The plaintiffs in the three captioned cases are not parties to the criminal action and intervention there is not possible. *Bankers' Mortg. Co. of Topeka, Kan.* v. *McComb, supra*, at 222.[2] The only practicable way for the numerous parties litigant to obtain judicial resolution of these issues is for me to find that which this voluminous record fully justifies. Therefore, I find that this order involves a controlling question of opinion and that an immediate appeal from this order will materially advance the ultimate termination of this litigation.

IT IS ORDERED that the motion of the class action plaintiffs in 82-J-17 to consolidate and transfer funds to the United States District Court for the District of New Jersey is denied,

IT IS FURTHER ORDERED that the motions to quash or dismiss the writs of garnishment are granted, and

IT IS FURTHER ORDERED that this memorandum opinion and order shall constitute my statement in writing required by 28 U.S.C. § 1292(b) so that the Court of Appeals may decide, in its discretion, whether to permit an appeal from this order.

DATED at Denver, Colorado this 26th day of July, 1982.

/s/ JOHN L. KANE, JR.
John L. Kane, Jr.
United States District Judge

---

[2] Another approach is mentioned in *T.C.F. Film Corp.* v. *Gourley*, 240 F.2d 711, 714 (3d Cir. 1957), but its use in this circuit is unknown.

APPENDIX H

United States Court of Appeals

For the Tenth Circuit

SLIP OPINION

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 82-1948

ROBERT C. HERZFELD,

Petitioner,

v.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO and THE HONORABLE FRED M. WINNER,

Respondents.

No. 82-1994
(D.C. Crim. No. 81-CR-122)

UNITED STATES OF AMERICA,

Plaintiff,

v.

TRENTON H. PARKER, INTERNATIONAL MINING EXCHANGE, INC.,

Defendants,

ELIZABETH EKEN, as representative of the class of investors defrauded by Trenton H. Parker and International Mining Exchange, Inc.,

Appellant,

WILLIAM C. LAM,

Receiver-Appellee.

No. 82-2044
(D.C. Civ. No. 80-K-850)

ROBERT C. HERZFELD,
Plaintiff-Appellant,

v.

TRENTON H. PARKER, ADRIAN DOYLE, JAMES T. WILSON, STEPHEN SPANGLER, ROBERT E. NORWOOD and INTERNATIONAL MINING EXCHANGE, a Colorado corporation.
Defendants-Appellees.

No. 82-2045
(D.C. Civ. No. 80-K-859)

ROBERT F. BROWN, ROBERT A. BRANDT and RFB PETROLEUM, INC., a Texas corporation.
Plaintiffs-Appellants,

v.

TRENTON H. PARKER, THE INTERNATIONAL MINING EXCHANGE, INC., a Colorado corporation, R. STEVEN SPANGLER, JAMES T. WILSON, ADRIAN DOYLE and ROBERT NORWOOD,
Defendants-Appellees.

No. 82-2046
(D.C. Civ. No. 82-J-17)

ELIZABETH EKEN and WILLIAM JOHNSON,
Plaintiffs-Appellants,

v.

INTERNATIONAL MINING EXCHANGE, INC., et al.,
Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Patrick C. English of Dines, English & O'Kane, Clifton, New Jersey (Walter L. Gerash of Gerash & Robinson, P.C., Denver, Colorado, with him on the brief), for Appellant Elizabeth Eken.

Richard B. Podoll of Podoll and Podoll, P.C., Denver, Colorado, for Appellant Robert C. Herzfeld.

William A. Wilson of William Andrew Wilson, P.C., Denver, Colorado, for Appellants Robert F. Brown and RFB Petroleum, Inc.

Richard N. Stuckey of Keene, Munsinger & Stuckey, Denver, Colorado, for Appellee William C. Lam.

Robert T. McAllister, Assistant United States Attorney (Robert N. Miller, United States Attorney, and Gerald J. Rafferty, Assistant United States Attorney, with him on the brief), Denver, Colorado, for Appellee United States of America.

Before SETH, Chief Judge, BARRETT and DOYLE, Circuit Judges.

SETH, Chief Judge.

FILED
United States Court of Appeals
Tenth Circuit
JAN 31 1983
HOWARD K. PHILLIPS
Clerk

In this case we consider consolidated appeals all of which arise from a somewhat involved set of facts. We set out only the facts necessary to explain our disposition of the matter.

Trenton H. Parker was indicted in Colorado for mail fraud in connection with an investment plan. During his trial he pled guilty in the United States District Court for Colorado under a plea agreement pursuant to which he transferred to that court in Colorado approximately six million dollars which had been on deposit in a bank in the Bahamas. This money was part of the proceeds of the "Gold Tax Shelter Investment Program" which was the particular scheme which gave rise to the criminal charges. Pursuant to the plea agreement and the sentencing, the United States District Judge in Colorado ordered that the money be used for restitution to those investors defrauded by the Gold Tax Scheme. The judge further ordered that the restitution be effected through a receivership and appointed a receiver. This appontment of a receiver during the course of the criminal proceedings and with no pending civil action is contested in each of the instant appeals.

Prior to the criminal proceedings several private investors, among them appellant Herzfeld, filed suits in the United States District Court for Colorado to recover monies lost in some of Mr. Parker's investment plans. After a lengthy discovery process, summary judgment for these plaintiffs was therein granted for about four million dollars. By far the greatest part of that figure represented attorneys' fees and punitive damages. Shortly thereafter (December 23, 1981) a class action was brought in New Jersey on behalf of investors defrauded in the "Gold Tax Shelter Investment Program." The United States District Judge certified the class on January 29, 1982 and issued a restraining order against Barclay's Bank in the Bahamas and others. There were deposits of Mr. Parker in the bank which were proceeds of the Gold Tax scheme.

The Grand Cayman bank had entered no appearance in the class action pending in New Jersey. The government argues that any conformance by the bank to the restraining order

would have been a purely voluntary matter. Thus it points to an affidavit by an Assistant United States Attorney which recites that the bank manager and its counsel advised him, apparently after the fact, that the bank would not honor a restraining order and would instead have transferred the funds on the request of Mr. Parker. Also, the only action taken by the bank was taken after the depositor, Mr. Parker, requested that the funds be transferred to Colorado pursuant to the plea agreement and the funds were so immediately transferred.

We do not decide whether the Grand Cayman bank was or was not bound by the orders of the New Jersey court. The court modified its order about the same time to permit the transfer of funds and the transfer was made in any event. Mr. Parker entered his plea on February 9, 1982 and he directed the bank to make the transfer. As mentioned, the funds were so transferred by the Grand Cayman bank to Colorado, and then into the registry of the court and to the receiver. The receiver was later directed by the instructions of the court given at the sentencing of Trenton Parker. The receiver invested the funds pending their distribution and set about to identify the defrauded investors.

Before any disbursement, the claims here considered were asserted against the funds. The plaintiffs in the Colorado civil actions attempted garnishment of the money in the receivership as did the class action plaintiffs. These parties argued that the receivership was void and that the funds were subject to garnishment. The class certified in New Jersey also moved to have the money transferred into a receivership there. In support of this motion the class also argued that the Colorado receivership was void.

The claims by the parties in the civil suits came before a judge other than the one before whom the criminal action had been heard and he ruled that the civil plaintiffs could not prevail unless the receivership established in the criminal case was found to be void. He refused to invalidate the receivership,

he quashed the writs of garnishment, and denied the motion to transfer the funds to New Jersey. The judge recognized that the validity of the appointment of a receiver in a criminal case was the controlling question of law in the disposition of the claims of the civil plaintiffs, and was a matter about which there could be substantial difference of opinion. He formally made these findings for review under 28 U.S.C. § 1292.

In addition to this, the Colorado plaintiffs have petitioned this court for a writ of prohibition directed against the receivership. Finally, there was an appeal pending from the denial of a motion filed by the New Jersey class plaintiffs in the Colorado criminal case requesting the transfer of the funds to New Jersey. These cases are consolidated to consider the question whether the receivership established in the criminal case is valid.

The district court's power to provide for restitution is created by the statutes relating to probation and suspension of sentences. Thus 18 U.S.C. § 3651 provides in part that:

> "While on probation and among the conditions thereof, the defendant—
>
> . . . .
>
> "May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and. . . ."

The statute does not delineate what, if any, special powers are granted to the sentencing court to create means by which restitution might be accomplished. This restitution is part of the criminal and sentencing procedure under the statute.

Rule 57(b) of the Federal Rules of Criminal Procedure gives courts latitude in fashioning special procedures. This section reads:

> "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

There is no convincing claim that any rule or statute makes the order in question "unlawful" nor that it is necessarily inconsistent with statutory law. Instead the parties in the civil actions urge that there is an absence of express authority and thus of jurisdiction to create the receivership.

The appellants urge that the legislative history as well as some judicial interpretation of Rule 57(b) suggests that it was directed to alleviate possible conflicts between state and federal procedures, and that it cannot be used to justify such an unusual practice as is here in question. 8B Moore's Federal Practice ¶ 57.03 at 57-4 (2d ed. 1965). However, legal and practical considerations militate against such a narrow interpretation.

Congress' enactment of the provision providing for restitution must contemplate sufficient flexibility and authority in criminal proceedings to accomplish restitution in a great variety of circumstances. In Blue Cross Ass'n v. Harris, 662 F.2d 972, at 978, the Eighth Circuit observed:

> "It is a commonplace of statutory construction that a legislative grant of a power carries with it the right to use the means and instrumentalities necessary to the beneficial exercise of that power."

See also Daly v. Stratton, 326 F.2d 340 (7th Cir.). Thus, insofar as a receivership was necessary to accomplish restitution in these circumstances the authority to create the receivership should be considered as implicit in the power to order restitution.

As to changes taking place *after* defendant's trial, it is significant that by Public Law 97-291 restitution may now be ordered whether or not the defendant is placed on probation, and it has become a much more important part of sentencing. Reasons must now be expressed by the sentencing court if it does not order restitution in full. For purposes of this appeal it is important that these changes provide for much broader and flexible orders for restitution and new ways to enforce such orders entered in the criminal proceedings. But again there is

no machinery provided or required to accomplish the restitution itself. This matter is still left to the discretion of the sentencing court, and in our view this includes the receivership here in issue.

The considerations involving practical concerns have also been recognized. Courts are making increasing use of special probation orders suitable for particular cases. We have approved such devices. United States v. Lawson, 670 F.2d 923 (10th Cir.). The use of special provisions demonstrates the need for flexibility in orders which attempt to make effective use of the authority to fashion useful probation. The Ninth Circuit in United States v. Pierce, 561 F.2d 735, stated that the "practical needs of the probation system" are a consideration in determining the validity of special conditions on probation. *See also* United States v. Consuelo-Gonzales, 521 F.2d 259 (9th Cir.). Thus even if the receivership cannot be said to be a necessity but a practical and effective device to assist in effecting the goals of the criminal system, it should be approved.

In a scheme like this one, where substantial sums of money are involved, the appointment of a receiver to invest and distribute the money is both necessary and beneficial to accomplish restitution. The functions to be performed are typically those of a receiver—only the setting is unusual.

The parties have cited three cases in the United States Courts of Appeal which involved receivership in the context of a criminal case. These are United States v. Roberts, 619 F.2d 1 (7th Cir.); United States v. Boswell, 605 F.2d 171 (5th Cir.); Patterson v. Stovall, 528 F.2d 108 (7th Cir.). In all of these cases, however, the receiverships were initially established through civil actions.

The usual practice of directing a probation officer to accomplish restitution is desirable where there are few claimants and where the amount of money is not great. However, where as here the interim investment of the money is necessary, where the identification of the persons entitled to restitution may be difficult, where the number of claimants is large and a pro rata

distribution of a large fund is necessary, a person with more specialized training is required. The expertise of the probation officers is in other fields.

The Colorado receiver is under control and direction of the court appointing him as are the receivership proceedings to accomplish restitution. There is no suggestion that there may be a delegation of authority to private litigants nor is restitution part of litigation among private parties. Thus there would seem to be a serious question whether the district court in Colorado could delegate restitution to be accomplished in such proceedings nor even by another receiver appointed in connection therewith.

A criminal proceeding in a United States district court is not in a separate compartment with the court exercising only a limited portion of its authority as the appellants argue. The federal courts obviously are of limited jurisdiction but the extent of the authority of the district courts in these circumstances is not limited or governed by whether the proceeding is criminal or civil. We find nothing in the decisions nor in statutory law which prevents the creation of the receivership in the criminal action here under consideration.

There is an important additional factor in the case which also leads to the conclusion we reach. This is the fact that the return of the money to the United States and restitution to the investors was part of the plea agreement between the United States and the defendant. It was reached during the course of defendant's trial. The defendant performed his part of the agreement in instructing the Grand Cayman bank to remit the funds to the United States. This was the only effective action to bring the funds into the registry of the court to permit restitution. It remains for this restitution to proceed to conclusion, for the plea agreement to be executed on the Government's side, and for the condition of probation to be met.

Thus the plea agreement, the return of the funds to the United States, the sentencing and the restitution are all interrelated parts of the proceedings in Colorado which started

with the indictment of the defendant in June of 1981. The restitution is the unexecuted part of this bundle and remains part of the sentencing. It is important that the Colorado proceedings thus continue on the track they are now on, and that nothing be done to jeopardize the restitution underway pursuant to the agreed transfer of funds and the plea agreement generally.

The New Jersey judge, Judge Stern, in his modification of the injunction indicated that the important thing was to have the transfer of funds accomplished. The fact that the funds would become locked into the Colorado proceedings may not then have been contemplated, but in any event, they became available to the investors which was the end sought in the class action. Judge Stern thus took all the action in the New Jersey suit that was possible to protect the investors and to prevent the defendant from dissipating the funds in the Grand Cayman bank. This, together with the action of the prosecutors in the plea bargaining, has made the money available for return to the investors. It makes no difference at this point what the Grand Cayman bank would or would not have done had the defendant not taken the action he did as part of the plea agreement as the funds were remitted, and they are under the control of the Colorado court for the eventual return to investors. Both the New Jersey court and the Colorado court are trying to have as much money as possible returned to investors. There appears to be no reason why they cannot proceed on parallel paths made necessary by the unusual circumstances and the origin of each action.

Each of the groups of parties in the civil proceedings urge that they did the most to bring the defendant to justice, to determine where the invested funds had been deposited, and were otherwise diligent in pursuing their claims. However, we cannot decide these appeals on the basis of which of the parties is entitled to the most equitable consideration. Again we must hold that the trial, the plea bargain, the return of funds to the United States, the receivership and the probation have all been interdependent elements of the Colorado criminal

proceedings. It is one package for all practical purposes, and should be there concluded as such quickly and efficiently as possible.

We hold that the Colorado receivership is valid in all respects and the funds therein held are in no way subject to garnishment.

The application for a writ of prohibition is denied in Case 82-1948.

In 82-1944 we affirm the denial of motions to transfer the receivership funds to the New Jersey class action or to a receivership there created and otherwise affirm the trial court.

In 82-2044 and 82-2045 we affirm the order of the trial court quashing the writs of garnishment and the denial of relief to the movants.

In 82-2046 we also affirm the order of the trial judge refusing to transfer funds to New Jersey and otherwise affirm the orders of the trial judge.

APPENDIX I

CONSIDERATION FOR REHEARING

No. 82-2045

ROBERT F. BROWN, ROBERT A. BRANDT and
RFB PETROLEUM, INC., a Texas Corporation.
Plaintiffs-Appellants,

v.

TRENTON H. PARKER, THE INTERNATIONAL MINING EXCHANGE,
INC., a Colorado Corporation, R. STEVEN SPANGLER,
JAMES T. WILSON, ADRIAN DOYLE and ROBERT NORWOOD,
Defendants-Appellees.

No. 82-2046

ELIZABETH EKEN and WILLIAM JOHNSON,
Plaintiffs-Appellants,

v.

INTERNATIONAL MINING EXCHANGE, INC., et al.,
Defendants-Appellees.

This matter comes on for consideration of appellants' petitions for rehearing and suggestions for rehearing in banc in the captioned appeals.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decisions sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestions for rehearing in banc are denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS/Clerk

APPENDIX J

CONSIDERATION OF MOTIONS FOR STAY

MARCH TERM—March 28, 1983

Before Honorable Oliver Seth, Honorable James E. Barrett, and Honorable William C. Doyle, Circuit Judges

---

No. 82-1948

ROBERT C. HERZFELD,

Petitioner,

v.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO and THE HONORABLE FRED M. WINNER,

Respondents.

No. 82-1994

UNITED STATES OF AMERICA,

Plaintiff,

v.

TRENTON H. PARKER, INTERNATIONAL MINING EXCHANGE, INC.,

Defendants,

ELIZABETH EKEN, as representative of the class of investors defrauded by Trenton H. Parker and International Mining Exchange, Inc.,

Appellant,

WILLIAM C. LAM,

Receiver-Appellee.

No. 82-2044

ROBERT C. HERZFELD,
Plaintiff-Appellant,

v.

TRENTON H. PARKER, ADRIAN DOYLE, JAMES T. WILSON, STEPHEN SPANGLER, ROBERT E. NORWOOD and INTERNATIONAL MINING EXCHANGE, a Colorado Corporation.
Defendants-Appellees.

No. 82-2045

ROBERT F. BROWN, ROBERT A. BRANDT and RFB PETROLEUM, INC., a Texas Corporation.
Plaintiffs-Appellants,

v.

TRENTON H. PARKER, THE INTERNATIONAL MINING EXCHANGE, INC., a Colorado Corporation, R. STEVEN SPANGLER, JAMES T. WILSON, ADRIAN DOYLE and ROBERT NORWOOD,
Defendants-Appellees.

No. 82-2046

ELIZABETH EKEN and WILLIAM JOHNSON,
Plaintiffs-Appellants,

v.

INTERNATIONAL MINING EXCHANGE, INC., et al.,
Defendants-Appellees.

This matter comes on for consideration of appellants' motions for stay of mandates in the captioned appeals pending application to the Supreme Court for certiorari.

Upon consideration whereof, it is ordered that the mandates are stayed until April 27, 1983, pending certiorari, and that if, on or before that date, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the

United States that appellants have timely filed a petition for writ of certiorari in the Supreme Court, the stays shall continue until final disposition by the Supreme Court.

/s/ Howard K. Phillips

HOWARD K. PHILLIPS
Clerk

APPENDIX K

CHIEF JUDGE FRED M. WINNER
Feb. 8, 1982

REPORTER—GRIGGS & COOPER
DEPUTY—SPENCER

81-CR-122

ROBERT MCALLISTER
GERALD RAFFERTY
DANIEL SMITH
WILLIAM WALLER
DENIS MARK

USA

v.

TRENTON H. PARKER &
INT'L MINING EXCHANGE CO.

Trial to Jury—5th Day

9:50 am Court in session—in chambers

also present: Robert N. Miller
Andy Vogt

unreported

Discussion of the Court and Counsel Re Possible Disposition of this Matter and a Request for Stay of Other Litigation

10:15 am Court in recess in chambers

10:20 am Court in session

* * *

No. 82-1815

In The

Supreme Court of the United States

October Term, 1983

ELIZABETH EKEN AND WILLIAM JOHNSON,
As Representatives of the Class of Investors
Defrauded by Trenton H. Parker and
International Mining Exchange, Inc.,

Petitioners,

vs.

INTERNATIONAL MINING EXCHANGE, INC.,
TRENTON H. PARKER, et al.

UNITED STATES

vs.

TRENTON H. PARKER and INTERNATIONAL
MINING EXCHANGE, INC.

ELIZABETH EKEN and WILLIAM JOHNSON,
As Representatives of the Class of Investors
Defrauded by Trenton H. Parker and
International Mining Exchange, Inc.,

Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

DINES AND ENGLISH,
PATRICK C. ENGLISH,
Attorneys for Petitioners,
685 Van Houten Avenue
Clifton, New Jersey 07013
(201) 778-7575

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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TABLE OF AUTHORITIES

CASES:

RELATED PETITIONS PENDING BEFORE THIS COURT

Related petitions for writs of certiorari are pending in *Robert F. Brown and R.F.B. Petroleum, Inc., v. Trenton H. Parker, et al.* (No. 82-1732) and *Herzfield v. United States District Court for the District of Colorado and the Honorable Fred Winner, et al.,* (No. 82-1731).

No. 82-1815

In The

Supreme Court of the United States

October Term, 1983

ELIZABETH EKEN AND WILLIAM JOHNSON,
As Representatives of the Class of Investors
Defrauded by Trenton H. Parker and
International Mining Exchange, Inc.,

Petitioners,

vs.

INTERNATIONAL MINING EXCHANGE, INC.,
TRENTON H. PARKER, et al.

UNITED STATES

vs.

TRENTON H. PARKER and INTERNATIONAL
MINING EXCHANGE, INC.

ELIZABETH EKEN and WILLIAM JOHNSON,
As Representatives of the Class of Investors
Defrauded by Trenton H. Parker and
International Mining Exchange, Inc.,

Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

REPLY TO THE GOVERNMENT'S STATEMENT OF THE CASE

There are a number of ambiguities and omissions which appear in the "Statement" section of the govern-

ment's brief in opposition for a writ of certiorari. Several are material and are worthy of clarification.

First, the government's brief fails to mention that it was the investigation which was conducted on the part of the class action which located the funds of defrauded investors. The government's brief fails to mention that it was the order of the United States District Court for the District of New Jersey which blocked an attempt by defendants to transfer those funds out of possible reach. The government's brief fails to mention that the plea of defendants came only after the United States District Court for the District of New Jersey had, in effect, seized the funds in question for the benefit of the class of investors defrauded by Trenton Parker and International Mining Exchange, Inc.

The government's brief fails to note that transfer of funds to the control of the criminal court was to be transitory in nature, done to merely effectuate speedy physical transfer to the United States and that at no time did the government ever disclose to the judge hearing the class action that it intended to later argue that by entering an Order permitting transfer the civil court had lost jurisdiction over the funds in question.

Perhaps even more importantly, the government does not disclose in its brief that the recovery, significant as it was, was merely a fraction of the total amount stolen from investors.[1] The government's brief makes a brief

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[1] The recovery represents slightly over 50% of the amount thus far identified thru the class action as having been stolen from investors. The class action litigation is continuing to vigorously pursue other potentionally liable, a task complicated immensely by the usurpation by the criminal court.

allusion in a footnote, but does not make clear, that the class action continues to collect funds for investors, both by tracking down additional foreign depositories of the convicted defendants and by continuing to prosecute the civil action against others liable. This includes, but is not limited to the recovery of some $400,000.00 in a foreign bank account, the ownership of which was consistently denied by the convicted defendants.

The government's brief fails to make clear that, Mr. Parker's plea was not conditioned upon the creation of a receivership in the criminal action, and that the criminal receivership was created only after Parker's plea.

The government's brief fails to make clear that the funds recovered quite literally did not belong to the convicted defendants, but rather to the defrauded investors who made up the class. The government's brief fails to note that not one of the defrauded investors (who are the owners of the funds) have supported the creation of a receivership from the criminal court and, indeed, the continuation of the receivership has been opposed by not only the class representatives, but by other defrauded investors as well.

Finally, the brief of the government fails to point out that despite several stays issued by the United States Court of Appeals for the Tenth Circuit Court issued at the request of defrauded investors the receivership in the criminal action has already caused the expenditure of $100,000.00,[2] most of which have gone to receiver's and at-

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[2] The propriety of these expenditures in light of the stays issued by the Tenth Circuit is open to question and is the subject of certain requests for writs of prohibition pending before the Tenth Circuit.

torneys fees. The government fails to note that these expenditures, as well as future expenditures if the criminal receivership is allowed to stand, are totally unnecessary since the efforts by the receiver to identify investors are needlessly duplicative of the activities conducted on behalf of the class action.[3]

All of the above are salient factual points. None were addressed in the government's brief.

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REPLY TO THE GOVERNMENT'S ARGUMENT

The general approach taken in the brief submitted by the government in opposition to the petition for writ of certiorari is to attempt to avoid rather than respond to the arguments advanced in the petitions. However, where the government does advance legal argument, its legal assertions prove to be incorrect and merit correction. Ironically, many of the cases cited by the government, when reviewed, actually support the position taken by the class.

The implication of the government's brief is that the issue sought to be raised is the permissability of an Order of restitution emanating from a criminal court. That is not at all an issue. What is at issue is the creation and continuation by a criminal court of a receivership over the express objection of the representatives of the individuals on whose behalf the receivership was purportedly

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[3] Incredibly, the criminal receivership has repeatedly refused to take action to exchange lists of investors with counsel in the class action.

created. What is at issue is the supercission of and interference with the normal and appropriate civil processes by a court hearing a criminal case.

The government asserts that the criminal court's action in appointing a receiver represents, "no departure from settled practice. . . ." (Government's brief at 8). That assertion is simply inaccurate. There is no precedent in the annals of American jurisprudence for the creation of a receivership by a criminal court, much less any precedent where, as here, there already existed a civil proceeding which had first exercised jurisdiction over the funds in question. The cases relied upon by the government as precedent, far from supporting its position, actually support that of petitioners. The primary case cited by the government, *United States v. Roberts,* 619 F. 2d 1 (7th Cir. 1979) is one in which a passing reference was made in a *per curiam* opinion to a receivership which was ultimately to effectuate restitution. However, as the record in the *Roberts* case shows and as Judge Kane noted in his opinion below, there was no receiver appointed by the judge hearing the criminal case of *United States v. Roberts.* The receivership referred to in the Seventh Circuit's opinion was appointed in a pre-existing *civil proceeding* by another federal judge. The trial judge in *Roberts,* did no more than direct the defendant to cooperate with the receivership emanating from the civil action. Thus, the procedure sanctioned by the Seventh Circuit is precisely the procedure which petitioners contend should have been followed in this matter. Consequently it is undeniable that the government's reliance on *United States v. Roberts* is wholly misplaced.

Similarly, the government's reliance on *United States v. Boswell,* 565 F. 2d 1338 (5th Cir.), *cert. den.,* 439 U. S. 819 (1978) is also completely in error. Again a receivership is mentioned in the circuit court's opinion, but had the history of the case been fully reviewed, the government would have discovered that the task of identifying defrauded investors was being carried out not by a probation officer as asserted, or by a receiver appointed in a criminal case, but by a receiver appointed by a civil court in a pending state action. 565 F. 2d at 2. It further appears that the funds were to be distributed to investors either through the civil receivership or at the direction of the receiver appointed by the civil court. Thus, though *Boswell* is primarily concerned with other matters, to the extent that it involves a receivership it too supports the position put forth by petitioners.[4]

To the extent applicable, even *United States v. Barrington,* (No's. 82-5017 and 82-6159) (4th Cir. June 16, 1983), cited by the government, supports the petitioners. In *Barrington,* the Fourth Circuit supported the creation of a trust fund by a restitutionary order. But, the fund was to be distributed through civil litigation, not through the criminal courts. Thus, any reliance by the government on this unreported case is totally unjustified.

This court has admonished that the creation of receiverships is "to be watched with a jealous eye lest their function be perverted." *Kelleam v. Maryland Casualty Co.,* 312 U. S. 373, 381 (1941). It has admonished the low-

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[4] It appears that the defendant in *Boswell* did not make the required restitution. See *United States v. Boswell,* 605 F. 2d 171 (5th Cir. 1979).

er courts that the appointment of a receiver is an extraordinary action and that restraint should be exercised in their creation. E. g., *Kelleam v. Maryland Casualty Co.*, supra; *Gordon v. Washington,* 295 U. S. 30 (1939). In light of these admonitions, there is one omission in the government's brief which is glaring. Nowhere in that brief is there any explanation offered as to why the practice undertaken for the first time below is either necessary or even why it is desirable. It is submitted that there is good reason for the omission, for the practice is neither necessary nor desirable. There is no reason which can possibly be advanced for the unnecessary expense, duplication and confusion caused by the creation of a receivership from the criminal action.

The funds under the control of the receiver are funds actually belonging to the class of the investors defrauded. The duly authorized class representatives have consistently opposed the receivership. Not a single investor of the approximately 1,200 known to have been defrauded has come forward to support the perpetuation of the receivership arising from the criminal court. Thus, the very individuals for whom the receiver is purporting to act have made it clear that they feel the receivership should be terminated.

It is not an overstatement to assert that at stake in this case is the very perception of the federal court system as a just organ for dispute resolution. The federal courts have been given specified statutory powers to wield where they must in order to resolve legal issues. However, the accretion of power is not an end in itself. Similarily, as this court has specifically stated, "a receivership is only a means to reach some legitimate end sought

through the power of a court of equity. It is not an end in itself." *Kelleam v. Maryland Casualty Co.*, 312 U. S. at 381, quoting *Gordon v. Washington*, 295 U. S. at 37.

Yet, the government does not dispute in its brief that the receivership arising from the criminal court is without necessity. Thus, its perpetuation, if permitted by this court, would only be for its own sake and creates a precedent which will significantly, and detrimentally, alter the respective roles of criminal and civil courts in the federal system.

CONCLUSION

The government has not even attempted to rebut many of the arguments advanced in these petitioners' original submission concerning why this case presents an important issue which should be dealt with by this court. There was no attempt to convince the court that there existed any necessity whatsoever for the appointment of a receiver by the criminal court or that the civil court, which first seized and protected the assets recovered should not be permitted to manage and distribute those assets and thereby avoid duplication of cost, confusion, and the potential for conflict between federal district courts.

The thrust of the government's argument, insofar as these petitioners are concerned, is that the action by the courts below represent no departure from precedent. However, when the cases cited by the government are reviewed they show that not only do the cases cited fail to support

the government's position but that they actually support the position of these petitioners that the creation of a receivership from the criminal court is unprecedented, entirely unnecessary and is undesirable.

The guidance of this court is desperately needed. It is, therefore, respectfully urged that the petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit be granted.

Respectfully submitted,

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